

Office of the Attorney General
State of North Dakota

Opinion No. 82-11

Date Issued: February 17, 1982

Requested by: Wayne O. Solberg
Fargo City Attorney

--QUESTIONS PRESENTED--

I.

Whether the citizens of a home rule city, having a commission form of government, possess the power of initiative and referendum as provided in Chapter 40-12 of the North Dakota Century Code where that city has no ordinance implementing that power.

II.

Whether a home rule city, which has adopted the eleven-member council form of government, has the power to provide for the initiative and referendum of its ordinances despite the prohibition contained in Section 40-12-01, N.D.C.C.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the citizens of a home rule city, having a commission form of government, do possess the power of initiative and referendum as provided in Chapter 40-12, N.D.C.C., where that city has no ordinance implementing that power.

II.

It is my further opinion that a home rule city, which has adopted the eleven-member council form of government, does have the power to provide for the initiative and referendum of its ordinances despite the prohibition contained in Section 40-12-01, N.D.C.C.

--ANALYSIS--

I.

Section 40-12-01, N.D.C.C., provides that Chapter 40-12, N.D.C.C., dealing with the initiating and referring of municipal ordinances applies to all cities operating under the

commission and modern council system of government except those cities adopting the eleven-member council form of government. There is no requirement that a city must pass an ordinance implementing the power of initiative and referendum before it can take advantage of those powers provided by Chapter 40-12, N.D.C.C.

In Article III, Section 1 of the North Dakota Constitution, the people have retained unto themselves the powers of initiative, referendum, and recall. The last line of that section is particularly significant:

Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.

In Section 40-12-01, N.D.C.C., the Legislature has facilitated and safeguarded the powers of initiative and referendum to commission and modern council forms of city government. This is all that is required to protect these powers in those forms of city government. This is true whether or not the city has a home rule charter. Since no government can 'hamper, restrict, or impair' the powers of initiative and referendum, no city ordinance is necessary, although an ordinance enacting initiative and referendum would be permissible (even though it is redundant of state law) so long as it in no way hampers, restricts, or impairs these powers. This also applies to any separate article on initiative and referendum in a home rule charter. It is unnecessary, but permissible.

II.

Section 40-12-01, N.D.C.C., prohibits cities operating under the eleven-member council form of government from initiating and referring its municipal ordinances.

The constitutionality of such a prohibition is arguable in light of the last sentence of Article III, Section 1 of our state's Constitution. Under section 1-02-38, N.D.C.C., it is presumed that a statute when enacted is intended to be in 'compliance with the constitutions of the state and of the United States.' I must therefore defend the presumed constitutionality of all statutes. Assuming the constitutionality of this prohibition, it is clear that the Legislature has not enacted any law to facilitate and safeguard the powers of initiative and referendum to the people of eleven-member council cities. It is my opinion that eleven-member council cities under home rule can facilitate and safeguard these powers to themselves through an ordinance notwithstanding the prohibition of Section 40-12-01, N.D.C.C.

A home rule city which adopts an eleven-member council form of government and which has implemented the power of initiative and referendum would appear to be in conflict with state law. However, Section 40-05.1-05, N.D.C.C., provides for the supersession of existing home rule charter powers over state laws which may be in conflict. That section states in part as follows:

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict therewith, and shall be liberally construed for such purposes.

In *Litten v. City of Fargo*, 294 N.W.2d 628 (N.D. 1980), our Supreme Court stated that the language in Section 40-05.1-05, N.D.C.C., permitting a home rule city ordinance to supersede state law where there is a conflict between the two, has reference only to those specific powers included in the home rule charter under Section 40-05.1-06, N.D.C.C., and which are implemented by ordinances. Where a home rule city ordinance conflicts with state law, but has no basis in Section 40-05.1-06, N.D.C.C., the city ordinance will not supersede state law.

Section 40-05.1-06(7), N.D.C.C., states that home rule cities have the authority to provide 'for the adoption, amendment, and repeal of ordinances, resolutions, and regulations. . . .' To initiate or refer a municipal ordinance is to provide for the adoption, amendment, or repeal of that ordinance. When an eleven-member council under home rule enacts such an ordinance, then the supersession provision of Section 40-05.1-05 applies to override the prohibition of Section 40-12-01, N.D.C.C. A separate article on initiative and referendum in a home rule charter of an eleven-member council city is irrelevant.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

Robert O. Wefald
Attorney General